

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Executive Branch Review of FCC Applications
and Petitions with Foreign Ownership for
National Security, Law Enforcement, Foreign
Policy, and Trade Policy Concerns

IB Docket No. 16-155

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

Kent Bressie
Austin Bonner
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W., Suite 800
Washington, D.C. 20036-3537
+1 202 730 1337
kbressie@hwglaw.com

Counsel for Level 3 Communications, LLC

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INTRODUCTION AND SUMMARY

To provide regulatory certainty, reduce transaction costs, and foster foreign investment consistent with U.S. trade commitments, Level 3 Communications, LLC (“Level 3”), urges the Commission to adopt bright-line and transparent rules and timelines in reforming the Team Telecom process. Protection of U.S. national security, law enforcement, and public safety interests need not entail the uncertainty, costs, and inequitable treatment embodied by the current Team Telecom review process. In its notice of proposed rulemaking (“NPRM”), the Commission has wisely used an Executive Branch proposal to alter the Team Telecom review process. In the NPRM, the Commission has outlined a series of changes intended to reform the process by which the Executive Branch agencies that make up Team Telecom provide input on certain new license applications, foreign ownership petitions, and transaction-consent applications that raise national security, foreign policy, and trade concerns. Some of these changes represent positive steps toward increased efficiency and transparency. Other proposals,

while intended to speed and streamline the process, would produce unintended delays and complexities.

In these comments, Level 3 recommends that the Commission:

- Adopt the proposed 90-day timeline and take additional steps to prevent agencies from circumventing that rule;
- Limit Team Telecom review to applications and petitions presenting the possibility of material national security, law enforcement, foreign policy, and trade policy concerns;
- Avoid creating unnecessary new opportunities for delay in the Team Telecom review process;
- Reject calls for certifications that create unwarranted new burdens and extra-legal obligations; and
- Avoid collection of meaningless additional and burdensome information.

With the modifications described below, adoption of the proposals outlined in the NPRM would provide meaningful reforms that promote regulatory certainty, reduce transaction costs, and reduce discriminatory treatment.

I. THE COMMISSION SHOULD ADOPT A FIRM 90-DAY REVIEW TIMEFRAME.

A. A 90-Day Review Timeframe Would Provide Regulatory Certainty and Honor U.S. Trade Commitments Regarding Licensing Timeframes.

Level 3 supports the Commission's proposal for a 90-day review timeframe for Team Telecom reviews of new license applications, merger consents, and foreign ownership petitions.¹ Predictable and reasonable timelines promote the development and deployment of new communications infrastructure and services and encourage foreign-carrier market entry and foreign investment in the U.S. communications sector. Doubts about timing alone creates

¹ *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, Notice of Proposed Rulemaking, IB Docket No. 16-155, ¶ 36 (rel. June 24, 2016) ("NPRM").

uncertainty in complex transactions and increases financing costs by carrying debt for longer periods of time and paying higher rates to ensure availability. Those harms have and will continue to deter investment in the United States that would benefit U.S. businesses and consumers.

Predictable timelines are also necessary to comply with U.S. trade obligations. As part of its schedule of specific commitments in basic telecommunications services under the World Trade Organization (“WTO”) General Agreement on Trade in Services, the United States adopted the WTO Reference Paper. The WTO Reference Paper provides that where a license is required, the United States must make available to the public “all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence.”² Recent practice, in which the Commission has failed to adhere to *any* timeline due to unlimited deference to the Executive Branch, is inconsistent with those obligations.

In Appendices A and B, Level 3 provides data regarding recent processing timelines for transaction reviews and new cable landing license applications, application types with which Level 3 has great familiarity. As demonstrated in these appendices, recent processing timelines vary dramatically—sometimes by months or even years. Appendix B demonstrates that cable landing license application reviews require an extraordinary amount of time, particularly when compared with the Commission’s streamlining rules, which provide for grant of streamlined applications within 45 days of issuance of a public notice accepting an application for filing.³ The fact that Commission approval follows shortly after execution of Team Telecom mitigation in the

² United States, Schedule of Specific Commitments, Supp. 2. Fourth Protocol to the General Agreement on Trade in Services, GATS/SC/90/Suppl.2 at 6 (Apr. 11, 1997) (“U.S. Basic Telecom Commitments”).

³ See 47 C.F.R. § 1.767(i).

majority of reviews indicates that Team Telecom is a key determinant, if not the key determinant, in Commission reviews.

The success of the Committee on Foreign Investment in the United States (“CFIUS”) process demonstrates that a 90-day review period should be more than workable for Team Telecom. Pursuant to Section 721 of the Defense Production Act of 1950, as amended, the CFIUS conducts an initial 30-day review of a transaction involving a potential acquisition of control by a foreign person of a U.S. business engaged in interstate commerce.⁴ The CFIUS may subsequently conduct a 45-day investigation of a transaction involving more significant national security issues (and must do so for transactions that would result in foreign government control of an existing U.S. business), with a further 15 days for the President to block a transaction.⁵ In total, the CFIUS process should not last more than 90 days.

Since the CFIUS began submitting an annual report to Congress on covered transactions in 2008, 782 notices of transactions have been submitted for CFIUS review. Of these 782 notices, more than 60 percent have been reviewed and cleared within the initial 30-day review period.⁶ Given the comparable nature of the transactions reviewed by CFIUS and Team Telecom, and the efficiency with which CFIUS is able to complete its review process, Level 3

⁴ 50 U.S.C. § 4565.

⁵ *Id.*

⁶ COMM. ON FOREIGN INV. IN THE UNITED STATES, *Annual Report to Congress—Report Period: CY 2014*, Table I-2: Covered Transactions, Withdrawals, and Presidential Decisions 2009-2014 at 3 (2014), <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Annual%20Report%20to%20Congress%20for%20CY2014.pdf> (showing 627 notices were filed from 2009-2014); COMM. ON FOREIGN INV. IN THE UNITED STATES, *Covered Transactions, Withdrawals, and Presidential Decisions 2008-2012*, <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS%20Stats%202008-2012.pdf> (showing 155 notices were filed in 2008).

believes that a 90-day review period is more than sufficient for Team Telecom to complete its review. Because 90 days is more than adequate time for Team Telecom to reach a conclusion, Level 3 supports the proposed presumption that a failure by Team Telecom to respond within the specified timeframe means that Team Telecom has no objection to a grant of an application and that the Commission will proceed to act, as it does with submarine cable landing licenses vis-à-vis the current Department of State review process under the Cable Landing License Act and Executive Order 10530.

B. The Commission Should Ensure that Extensions Beyond 90 days Are Rare.

In addition to adopting predictable and reasonable timeframes, the Commission should ensure that any exceptions it creates to the 90-day timeline do not ultimately swallow the rule by (1) limiting the reasons that can justify the exemption, (2) requiring Team Telecom to seek the applicant or petitioner's consent and file a request with the Commission, and (3) taking steps to minimize misuse of clock-stopping procedures.⁷

First, to limit the use of extensions to truly unusual circumstances, the Commission should adopt rules that make a one-time extension of time available only in the event of a *force majeure* event (i.e., a natural disaster or government shutdown) or in cases where an application meeting certain criteria requires additional investigation by Team Telecom. These factors should include new classes of technology never previously reviewed by Team Telecom and material foreign ownership by a foreign government. In all cases, the reason for delay should be forces entirely beyond Team Telecom's control or the unique nature or complexity of the application—not the agency's failure to provide adequate staffing or resources for Team Telecom reviews.

⁷ NPRM ¶ 40.

Second, Level 3 supports the Commission’s proposal to require the Team Telecom agencies to make a public filing citing the factors supporting their extension requests and specifying the additional number of days needed.⁸ These public filings will promote accountability and allow the Commission to identify trends indicating that extension requests are becoming routine rather than rare. The Commission should use the filings to maintain statistics on the number of applications requiring more than 90 days for review.

The Commission should not, however, treat these filings as self-granting “notifications.”⁹ Instead, the Commission should require Team Telecom to seek the applicant’s consent to an extension and to file with the Commission a *request* for an extension no fewer than 10 days before the 90-day deadline. The request should state whether or not the applicant consents. If the applicant consents, the Commission may review and decide the request right away. Applicants that do not consent to the extension should be granted two days to respond with reasons why an extension is not warranted. These procedures will deter the agencies from reflexively seeking extensions when it might be possible to work collaboratively with the applicant to reach a timely resolution.

Third, the Commission should take steps to minimize the potential for abuse of rules that allow agencies to “pause” the 90-day timeline. Under the current proposal, the Commission can hit “pause” on the timeline (like the major transaction review timeline) if the applicant takes more than 7 days to respond to a supplementary request for information or to a mitigation proposal—a timeline that would be too short in many cases and could be used by the Team

⁸ *Id.*

⁹ *See id.* ¶ 43 (“Under our proposal, the Executive Branch would complete its review within the 90-day period or notify the Commission no later than the initial 90-day date that it requires additional time for review. . .”).

Telecom simply to extend the time for review. To minimize that potential, the Commission should require that Team Telecom limit supplemental information requests to request additional detail or clarification within the scope of the Paperwork Reduction Act-approved standard questions. Supplemental requests should not be allowed to expand the scope of Team Telecom's inquiry. Here again, the Commission should maintain publicly available statistics on the number of supplementary requests that require applicants to seek extensions of time. If extensions are sought more than rarely, the Commission should investigate whether the standard application needs to be updated in order to reduce the need for follow-up questions.

Without these measures, the danger of limitless review is real. As the data in Appendices A and B demonstrates, Team Telecom reviews can last many months or even years. This is particularly true when Team Telecom staff may also be responsible for matters such as CFIUS reviews that include statutory deadlines, as is the case with Department of Justice and Department of Homeland Security staff. (Team Telecom and CFIUS responsibilities remain separate at the Department of Defense.) The Commission should expect that if Team Telecom review extensions are readily available as compared with other statutory review processes, the other review processes will always take priority, resulting in longer Team Telecom reviews as a matter of agency resource allocation.

C. Team Telecom Reviews of Minor Modifications Should Be Expedited.

While a 90-day timeline may be appropriate for some applications and petitions, those that involve only minor modifications to a previously reviewed application should be expedited. Team Telecom often considers applications that involve only minor differences from previous reviews. Team Telecom's current practice treats these modification reviews as if they were

starting from a blank page, and they can take as long or longer than Team Telecom’s initial inquiry. The Commission should adopt rules that expedite these applications.

Level 3’s recent experience with modifying the cable landing license for the South American Crossing (“SAC”) submarine cable system provides a particularly acute example of unnecessary delays associated with minor modifications. Global Crossing Telecommunications, Inc. (“GCTI”), a Level 3 subsidiary, was granted a cable landing license for the SAC cable in February 2000, including a landing in Buenaventura, Colombia.¹⁰ The cable entered into service in 2001. Although a portion of the SAC segment to land in Colombia was constructed in contemplation of a landing at Buenaventura, no Colombia landing was ever completed, and no cable station was constructed in Colombia in connection with the partial completion of Segment H. In January 2015, GCTI sought to modify the SAC cable landing license to obtain authority for construction and operation of the SAC Colombia Spur consistent with the Commission’s current cable landing license rules.¹¹ Review of this modification request should have been straightforward: GTCI and Level 3 were already required to comply with Level 3’s existing network security agreement (“NSA”),¹² and Level 3’s ownership structure had been extensively evaluated by both the Commission and Team Telecom as part of its acquisition of Global

¹⁰ *See Application for a License to Land and Operate in the United States a Digital Submarine Cable System between the U.S. Virgin Islands, Brazil, Argentina, Chile, Peru, Colombia and Panama*, Cable Landing License, 15 FCC Rcd. 3039 (2000).

¹¹ Global Crossing Telecommunications, Inc., Application for Authority to Add a New Buenaventura, Colombia, Landing and Modify the Cable Landing License for South American Crossing, Application, File No. SCL-MOD-20150129-00002 (Jan. 28, 2015). Because of changes to Segment H (including ownership of particular facilities and the segment’s capacity), GCTI has filed an application to modify the license, rather than a landing point notification.

¹² *Id.* at 15.

Crossing Ltd. in 2011, and again in conjunction with its acquisition of tw telecom inc. in 2014. Instead of foregoing a review or conducting a truncated one, even though Level 3 requested in the transfer-of-control application that the Commission condition approval upon compliance with Level 3's existing NSA, Team Telecom conducted a lengthy review, precluding Commission approval until the end of August 2015.¹³ Every month the project was delayed cost Level 3 over \$200,000 in direct costs. Level 3 also lost revenue from planned clients during those months, and the region experienced capacity problems that should have been resolved by the SAC Colombia Spur.

Team Telecom can and should be required to expedite its process when nearly a majority of the relevant transaction details have previously been reviewed and approved. Level 3 therefore proposes that applications involving minor changes within five years of a previous application be assigned a shorter 30-day review period. Minor changes would be defined as applications involving expansion or modification to existing facilities (including changes in location), but not a material increase in foreign ownership or control, or a change in senior management. These applications can be reviewed more quickly because they do not require an extensive control analysis or the processing and review of personally identifying information. Team Telecom agencies will be able to focus their efforts on the new equipment. This expedited process will be aided by the standardization of Team Telecom's questions. Eligible applicants should be easy to identify; applicants can certify at the time of filing that (1) they have received an approval within the previous five years and (2) the answers to certain questions have not changed during that time. These expedited procedures will advance the Commission's goal of

¹³ See *Actions Taken Under Cable Landing License Act Section 1.767(a) Cable Landing Licenses, Modifications, and Assignments or Transfers of Control of Interests in Cable Landing Licenses* (47 C.F.R. § 1.767(a)), Public Notice, 30 FCC Rcd. 8442, 8443 (2015).

streamlining Team Telecom review and free up resources for the consideration of truly new national security, foreign policy, and trade issues.

II. THE COMMISSION SHOULD LIMIT TEAM TELECOM REVIEW TO APPLICATIONS AND PETITIONS WITH THE POTENTIAL TO RAISE MATERIAL NATIONAL SECURITY, LAW ENFORCEMENT, FOREIGN POLICY, AND TRADE POLICY CONCERNS.

Team Telecom interventions are already too common. When it adopted the *Foreign Participation Order*, the Commission identified the needs for Executive Branch “expertise . . . in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy.”¹⁴ The Commission noted, however, that it expected such “concerns to be raised *only in very rare circumstances*” and that “the scope of concerns that the Executive Branch will raise in the context of applications for Section 214 authority, cable landing licenses and applications to exceed the 25 percent indirect foreign ownership benchmark in Section 310(b)(4) of the Act is narrow and well defined.”¹⁵

Today, Team Telecom reviews applications involving an initial applicant or applicants, transferee or assignee, or change in indirect ownership in a subject wireless license with 10 percent or greater direct or indirect aggregate foreign ownership. Despite the heavy weight placed on foreign ownership in these reviews, nowhere in the NPRM or elsewhere has the Commission explained *why* foreign ownership should be used as the sole trigger for a Team Telecom review.

In an increasingly globalized telecommunications industry, many U.S. companies report a small share of foreign ownership. These companies, including Level 3, maintain extensive ties to the United States, work collaboratively with appropriate agencies, and manage large networks

¹⁴ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23,891, ¶ 63 (1997) (“*Foreign Participation Order*”).

¹⁵ *Id.* (emphasis added).

for the benefit of U.S. customers. These companies present a small risk to law enforcement and national security priorities, but are nonetheless painted with the broad brush of foreign ownership. Referring applications based solely on reportable foreign ownership draws resources away from actual security concerns and discriminates based on national treatment in violation of U.S. treaty obligations.¹⁶

In adopting rules with a foreign-ownership trigger, the Commission should explain why only applications involving foreign ownership are subject to such reviews. Such an explanation would also help to ensure compliance with national treatment and most favored nation (“MFN”) obligations in U.S. WTO commitments, which require, respectively, provision to a foreign service supplier or investor treatment no less favourable than that provided to a domestic service supplier or foreign service supplier or investor from another WTO member.¹⁷ As part of its reform efforts, the Commission should also work to identify more reliable indicia of risk to Team Telecom’s priorities. If the Commission continues to rely on foreign ownership as the trigger for referral, it should raise the threshold amount to 25 percent. That level will reduce the burden on applicants

¹⁶ See U.S. Basic Telecom Commitments. Team Telecom reviews have historically been rife with national treatment discrimination. In addition to problems associated with treating licensees differently based on nationality, mitigation agreements often force employers to violate the Immigration Reform and Control Act, 8 U.S.C. § 1324b, prohibition on discriminating against any individual “with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment” because of the individual’s national origin or immigration status by requiring the exclusion of foreign nationals from certain positions. While this provision does not apply to “discrimination because of citizenship status which is otherwise required in order to comply with law [or] regulation,” there is no law or regulation supporting Team Telecom’s authority to mandate the exclusion of foreign nationals from certain roles.

¹⁷ General Agreement on Trade in Services, arts. II (MFN), XVII (national treatment), WTO Agreement, Annex 1B, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 325 (GATT Secretariat 1994), reprinted in 33 I.L.M. 1167 (1994).

with *de minimis* foreign ownership and would be consistent with the Commission’s finding in the *Foreign Participation Order* that a 25 percent threshold would keep Team Telecom’s intervention into the Commission’s review process “narrow and well defined.”¹⁸

III. THE COMMISSION SHOULD NOT CREATE UNNECESSARY ADDITIONAL STEPS IN THE TEAM TELECOM PROCESS.

While Level 3 supports the Commission’s efforts to streamline Team Telecom reviews, the Commission’s proposal to collect the information at the application stage on Team Telecom’s behalf does not advance that goal.¹⁹ On the contrary, doing so would create more problems than the proposal solves. Information collection by the Commission is unlikely to expedite or simplify the process for several reasons.

First, the Commission by its own description lacks the expertise in Team Telecom’s areas of focus to determine the sufficiency of answers.²⁰ Team Telecom has, historically, used a loosely standardized question set for all applicants. Because these questions are not carefully tailored to each applicant, Team Telecom often receives responses explaining that certain information is inapplicable or not yet known at that stage in a project’s development. If the Commission reviews applications for completeness, it will be required to make individualized determinations about the relevance and timeliness of certain questions—issues with which Commission staff have neither experience nor expertise.

¹⁸ *Foreign Participation Order* ¶ 63.

¹⁹ *See* NPRM ¶ 25.

²⁰ *Foreign Participation Order* ¶ 62 (“... we realize that foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch.”).

Second, the Commission’s proposal would, as the NPRM acknowledges, require the Commission to become a central repository for highly sensitive personal and commercial information that the Commission has no need to access itself.²¹ In doing so, the Commission would unnecessarily widen the circle of people with access to everything from trade secrets to executives’ passport numbers and addresses. The Commission would have a duty to develop new security protocols—including cybersecurity, administrative security, and physical security protocols—in order to protect this information consistent with the Privacy Act and cybersecurity best practices.²² These procedures must be sufficiently robust to defend what will quickly become a valuable, one-stop repository of sensitive information that could be used to gain a commercial advantage or, more seriously, threaten the security of persons or communications facilities. Attacks on government networks are increasingly common; a Federal Information Security Modernization Act audit found that federal agencies experienced more than 77,000 attacks in the year following October 2014.²³ While the current practice of individual applicants communicating directly with Team Telecom is not without risk, it does not create an enduring collection of valuable information that would attract hacking attempts from state and non-state actors.

These security procedures and systems will have to be created out of whole cloth. The Team Telecom agencies do not currently have systems of records notices (“SORNs”) that govern

²¹ See NPRM ¶¶ 26, 27.

²² See 5 U.S.C. § 552a.

²³ Aaron Boyd, *Cybersecurity Incidents Rise Even as Feds Get Better*, FEDERAL TIMES (Mar. 22, 2016), <http://www.federaltimes.com/story/government/cybersecurity/2016/03/22/2015-fisma-report/82113254/>.

the secure maintenance of records they collect in response to the standard Team Telecom questionnaire.²⁴ To comply with the Privacy Act, a SORN will be required if the Commission intends to search their collection of questionnaire responses by individual employees' names or another personal identifier. Nor does the Commission or any of the agencies appear to have a turnkey solution for securely receiving and maintaining Team Telecom questionnaire information. That system will have to be developed, tested, and defended against security threats on an ongoing basis—efforts that will require not-yet-identified staff and financial resources.

There is a better way. Instead of investing time and resources in new systems, the Commission should simply require parties to file a certification accompanying the Commission application that they have submitted the necessary information to Team Telecom. The Commission should adopt its proposal to standardize the Team Telecom questionnaire for different categories of applicants and petitioners so that it can be made available to all applicants in advance. Standardization will streamline the process and allow parties to submit information to Team Telecom at the time of filing the Commission application. Individually tailoring the question set to each applicant has not proven to be beneficial. In practice, the questions for different categories of applications have been largely the same.

If the Commission adopts its proposal to standardize Team Telecom's information collections pursuant to the Paperwork Reduction Act ("PRA")—an appropriate and necessary step—and to make the questions publicly available, there is no reason why the Commission and Team Telecom filings cannot be made on the same day.²⁵ As the Commission notes in the

²⁴ See 5 U.S.C. § 552a(a)(5).

²⁵ NPRM ¶ 23.

NPRM, lengthy delays in the Team Telecom process have, in the past, required prudent applicants to file extremely early in the process of developing new facilities—so early that relevant business decisions were sometimes still unmade.²⁶ For example, submarine cable operators often file their applications before entering into certain vendor service agreements because the requirements for those agreements could only be determined when the project was more developed. If the Commission adopts a firm 90-day timeline, without “escape clauses” that indefinitely lengthen review, such early filing should no longer be necessary.

Filing directly with Team Telecom would eliminate the need for elaborate confidential filing procedures at the Commission. The NPRM describes a complex process for sorting out which information should be treated as confidential on a case-by-case basis.²⁷ In addition to adding delay, that proposal creates uncertainty about which information will be afforded confidential treatment.

IV. THE COMMISSION SHOULD REJECT CALLS FOR CERTIFICATIONS THAT CREATE UNWARRANTED NEW BURDENS AND EXTRA-LEGAL OBLIGATIONS.

In response to a request from the National Telecommunications and Information Administration (“NTIA”), the Commission has proposed to require all applicants and petitioners to make certain certifications as part of their Commission filings—regardless of whether Team Telecom review is warranted. The agencies have argued that these certifications will speed Team Telecom’s review by reducing the need for routine mitigation and ensure that applicants are aware of their obligations. In reality, Team Telecom’s proposed certifications are unnecessary and, in many cases, legally insupportable.

²⁶ *Id.* ¶ 24.

²⁷ *Id.* ¶ 26.

A. The Commission Should Not Adopt the Proposed CALEA Certification.

Under the Executive Branch proposal, applicants and petitioners would certify to the Commission that they will comply with applicable provisions of the Communications Assistance for Law Enforcement Act (“CALEA”). For many applicants, such a certification would needlessly restate existing legal obligations. The Commission already provides extensive guidance on CALEA compliance.²⁸ If the Commission is concerned that some applicants are unaware of these obligations, it can post public notice of them along with the application questions. Certifications are unnecessary.

Worse, the proposal outlined in the NPRM appears to require this certification from parties who are not actually subject to CALEA, creating confusion and, potentially, obligations that Congress never intended to impose.²⁹ CALEA applies only to common carriers and providers of substitutes for local exchange service; no other providers or activities should be covered by this certification. Simply put, many parties have no “applicable” CALEA obligations.

Because it is unnecessary and, in many cases, contrary to law, this certification is unlikely survive PRA review at the Office of Management and Budget (“OMB”).³⁰ OMB will, among other things, determine whether the proposed certification “is necessary for the proper

²⁸ FED. COMM’NS COMM’N, Communications Assistance for Law Enforcement Act, <https://www.fcc.gov/public-safety-and-homeland-security/policy-and-licensing-division/general/communications-assistance>.

²⁹ *See id.* (explaining that CALEA applies to “telecommunications carriers” as defined in the CALEA statute).

³⁰ 44 U.S.C. § 3506(c). While some certifications are not subject to PRA review, certifications used to “collect evidence of, or . . . monitor, compliance with regulatory standards” are covered by the PRA. 5 C.F.R. § 1320.3(h)(1).

performance of the functions of the agency, including whether the information has practical utility.”³¹ A certification that does nothing more than replicate existing legal obligations cannot be deemed “necessary.” That is doubly true in the case of parties who are not common carriers and providers of substitutes for local exchange service, who would be required to certify compliance with a legal obligation they do not have.

B. The Commission Should Reject the Executive Branch’s Proposed Data Localization Certification.

The certification regarding law enforcement access to communications poses even more serious problems. Team Telecom proposes to require applicants to certify that they will “make communications to, from, or within the United States, as well as records thereof, available in a form and location that permits them to be subject to lawful request or valid legal process under U.S. law, for services covered under the requested Commission license or authorization.”³² Contrary to NTIA’s assertion, this proposed certification could be understood to impose data localization requirements that have no statutory basis and that the United States has opposed when adopted by other countries.³³

Level 3 and other companies routinely comply with their obligations under the Stored Communications Act (“SCA”) to disclose communications stored in the United States to government officials in response to an appropriate request. But communications stored *outside*

³¹ Cass R. Sunstein, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, *Information Collection under the Paperwork Reduction Act*, at 5 (Apr. 7, 2010) (citing 44 U.S.C. § 3508).

³² NPRM ¶ 31.

³³ See, e.g., OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, Trans-Pacific Partnership Fact Sheet: Promoting Digital Trade, <https://ustr.gov/sites/default/files/TPP-Promoting-Digital-Trade-Fact-Sheet.pdf>.

the United States, including “communications to, from, or within the United States,” are not covered by the SCA. The Second Circuit recently confirmed that conclusion, holding that a warrant issued pursuant to the SCA does not have extraterritorial application.³⁴ This certification seeks to circumvent that ruling by requiring covered entities to repatriate data that law enforcement could not otherwise access. That expansion beyond existing law could place applicants and petitioners in jeopardy of violating conflicting data privacy obligations in other countries; it will certainly subject them to competitive pressure from companies not subject these new surveillance requirements. It also undermines efforts by the United States to dissuade other countries from adopting data localization and repatriation laws.

If, as NTIA states, “the requested certification essentially reflects current laws and obligations,” the Commission can solve these problems by building that into the certification.³⁵ Level 3 supports T-Mobile’s proposal that the certification be *expressly* limited to existing obligations created by statute or regulation.³⁶ Doing so would head off concerns that conflicting legal interpretations will lead to confusion and disputes.

V. THE COMMISSION SHOULD AVOID CREATING UNNECESSARY INFORMATIONAL BURDENS.

The Commission also seeks comment on NTIA’s proposal to require applicants to submit a variety of information requested by Team Telecom at the time of their applications to the

³⁴ *Microsoft Corp. v. United States*, No. 14-2985, 2016 WL 3770056 (2d Cir. July 14, 2016) (unpublished).

³⁵ NPRM ¶ 34.

³⁶ *Id.*

Commission.³⁷ As outlined in Level 3’s initial response to NTIA’s letter,³⁸ these redundant, vague, and overbroad requests are unlikely to advance the Commission’s goal of more efficient reviews.

In particular, the Commission should decline to seek additional information about other “[r]elationships with any foreign entities, or any U.S. subsidiaries or affiliates of foreign entities,”³⁹ as this vague request could potentially capture routine commercial activities and large quantities of data. Responding to this question could, even in relatively uncomplicated cases, become extremely burdensome. Level 3 and similarly situated companies do business as customers or vendors with hundreds of entities that have foreign addresses. It may not always be clear—especially in small transactions—whether these counterparties are actually foreign businesses or just non-U.S. locations or subsidiaries of U.S. businesses. Seeking out ownership information from each of these companies would impose an unreasonable burden, particularly where Level 3 is a small customer or supplier. If the Commission decides to adopt such broad application requirements, it should include a materiality standard to limit submissions to information relevant to Team Telecom’s decision making, an approach successfully implemented by the Department of Defense’s Defense Security Service in its Foreign Ownership, Control and Influence inquiries.

CONCLUSION

For the reasons stated above, Level 3 urges the Commission to refine and adopt NPRM proposals to improve regulatory certainty, reduce transaction costs, and permit the economic

³⁷ *Id.* ¶ 20.

³⁸ Comments of Level 3 Communications, LLC at 7-10, IB Docket No. 16-155 (filed May 23, 2016).

³⁹ NPRM at Appendix D (question 4).

benefits of foreign investment in communications without discrimination. The Commission should focus on these streamlining efforts, and reject measures that create complexity and new uncertainties.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kent Bressie". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kent Bressie
Austin Bonner
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W., Suite 800
Washington, D.C. 20036-3537
+1 202 730 1337
kbressie@hwglaw.com

Counsel for Level 3 Communications, LLC

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APPENDIX A: RECENT TRANSACTION REVIEW TIMELINES INVOLVING FCC AND TEAM TELECOM

<i>Transaction</i>	<i>Date FCC Application Filed</i>	<i>Date of NSA or LOA</i>	<i>Date FCC Consent Granted</i>	<i>Total Approval Time</i>
Liberty Global/CWC	Nov. 30, 2015	pending	pending	[262 days to date]
Zayo/MTS/Allstream	Nov. 25, 2015	none	Jan. 7, 2016	43 days
ATN/KeyTech	Nov. 4, 2015	pending	Mar. 29, 2016	146 days
Altice/Cablevision	Oct. 14, 2015	Apr. 20, 2016, LOA, amending earlier NSA	May 3, 2016	202 days
Telin/GTA TeleGuam	June 12, 2015	Transaction withdrawn on June 2, 2016		
Altice/Cequel	June 3, 2015	Dec. 11, 2015, NSA	Dec. 18, 2015	198 days
Telstra/Pacnet	Feb. 2, 2015	preexisting NSA	June 22, 2015	140 days
CWC/Columbus	Nov. 21, 2014	Sept. 11, 2015, LOA	Nov. 13, 2015	357 days
Hibernia/KCK	Aug. 20, 2014	Dec. 15, 2015, LOA	Jan. 12, 2015	145 days
Level 3/tw telecom	July 7, 2014	preexisting NSA	Oct. 24, 2014	109 days
Global Caribbean Fibre/Digicel	Dec. 19, 2013	Sept. 8, 2014, LOA amendment	Sept. 9, 2014	264 days
GlobeNet-Oi/BTG	July 29, 2013	Dec. 11, 2013, LOA	Dec. 13, 2013	137 days
SoftBank/Sprint/Clearwire	Nov. 16, 2012	May 28, 2013, NSA	July 3, 2013	229 days
T-Mobile/MetroPCS	Oct. 18, 2012	Mar. 7, 2013, NSA amendment	Mar. 12, 2013	145 days

<i>Transaction</i>	<i>Date FCC Application Filed</i>	<i>Date of NSA or LOA</i>	<i>Date FCC Consent Granted</i>	<i>Total Approval Time</i>
Wavecom/Hawaiian Telecom	July 16, 2012	Dec. 7, 2012	Dec. 28, 2012	165 days
C&W/Vodafone	June 13, 2012	Sept. 7, 2012	Oct. 3, 2012	112 days
Level 3/Global Crossing	May 11, 2011	Sept. 26, 2011, NSA (replacing prior NSA)	Sept. 29, 2011	141 days
DOCOMO/Guam Cellular	Apr. 4, 2006	Oct. 19, 2006 NSA	Nov. 13, 2006	223 days

**APPENDIX B: RECENT CABLE LANDING LICENSE REVIEW TIMELINES INVOLVING FCC
AND TEAM TELECOM**

<i>System</i>	<i>Date FCC Application Filed</i>	<i>Date of NSA or LOA</i>	<i>Date FCC Consent Granted</i>	<i>Total Approval Time</i>
MAREA	May 25, 2016	pending	pending	[85 days to date]
BRUSA	Mar. 30, 2016	pending	pending	[141 days to date]
Atisa	Mar. 14, 2016	pending	pending	[157 days to date]
Seabras-1	Jan. 15, 2016	pending	pending	[216 days to date]
NCP	Nov. 3, 2015	pending	pending	[289 days to date]
FASTER	June 26, 2015	May 27, 2016	June 2, 2016	342 days
SEA-US	June 26, 2015	pending	pending	[419 days to date]
Monet	Apr. 8, 2015	pending	pending	[498 days to date]
AEConnect	Feb. 5, 2014	Oct. 1, 2014, LOA	Oct. 21, 2014	258 days
PCCS	Jan. 16, 2013	Jan. 14, 2014, LOA	Jan. 24, 2014	373 days
viNGN	Dec. 21, 2012	none	Feb. 25, 2013	66 days
AMX-1	Mar. 30, 2012	Jan. 23, 2013, LOA	Jan. 31, 2013	307 days
Honotua	Sept. 26, 2008	Dec. 3, 2010, NSA	Dec. 6, 2010	801 days
Unity	May 16, 2008	Sept. 21, 2009, NSA	Oct. 5, 2009	507 days